Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ...74-1269

JOHN L. BARRY, Commissioner of the SUFFOLK COUNTY POLICE DEPARTMENT,

Petitioner,

against

THOMAS DWEN, as President of the Suffolk County Patrolmen's Benevolent Association and THOMAS DWEN, Individually,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1974

No. .....

JOHN L. BARRY, Commissioner of the SUFFOLK COUNTY POLICE DEPARTMENT,

Petitioner,

against

THOMAS DWEN, as President of the Suffolk County Patrolmen's Benevolent Association and THOMAS DWEN, Individually,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on January 9, 1975.

Citations to Opinions Below

The first opinion of the District Court for the Eastern District of New York is printed in Appendix B hereto, *infra*, p. 19a and is reported in 336 F. Supp. 487. The opinion of the Circuit Court of Appeals for the Second Circuit is printed in Appendix B hereto, *infra*, p. 9a and

is reported in 483 F. 2d 1126. The second opinion of the District Court is printed in Appendix B hereto, *infra*, p. 5a and is unreported. The judgment without opinion of the Circuit Court of Appeals is printed in Appendix B hereto, *infra*, p. 2a.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on January 9, 1975 (p. 2a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1) and Rule 19 (1) (b) of the Supreme Court Rules.

Question Presented

Whether a police department may constitutionally regulate the length of hair of individual police officers based upon the legitimate state interest of either safety and/or the morale factor of maintaining uniformity of discipline in a quasi-military organization such as the Suffolk County Police Department.

Statute Involved

The statutory provision involved is the Constitution of the United States, Amendment XIV, Section 1, U.S.C.A. Const. Amend. XIV, Section 1. The section is printed in Appendix A, *infra*, p. 1a.

Statement

By service of an order to show cause dated August 4, 1971, together with a summons and complaint, an action was commenced in the United States District Court for the Eastern District of New York to enjoin John L. Barry,

Commissioner of the Suffolk County Police Department, from enforcing General Order No. 71-1 which involved grooming standards for police officers. More particularly, the rule involved certain guidelines as to the length of a police officer's hair as well as regulating the growth of mustaches, beards and sideburns. The action had been commenced in the Federal District Court on the basis that the plaintiff's rights of free expression, due process and equal protection as provided in the First and Fourteenth Amendments of the United States Constitution had been violated.

By memorandum of decision and order dated November 8, 1971, Chief Justice Mishler of the District Court denied a motion for a preliminary injunction enjoining the Commissioner of the Suffolk County Police Department from enforcing the regulation. The Court held that uniformity of dress is part of the discipline of the local police department and a visible sign of the presence of the law. The Court further held that regulations involving dress and grooming should be left up to officials who are aware of local customs and taboos and not to the Courts.

On November 30, 1971, by memorandum of decision and order, the Hon. Jacob Mishler dismissed the complaint based upon his decision and order dated November 8, 1971. Thereafter, on December 6, 1971, plaintiff filed a notice of appeal to the United States Circuit Court of Appeals for the Second Circuit from both memorandum decisions and orders of the Hon. Jacob Mishler.

On August 22, 1973, the United States Court of Appeals for the Second Circuit reversed the decisions and orders of the Hon. Jacob Mishler and remanded the case to the District Court for trial. The Second Circuit Court of Appeals held that the choice of personal appearance is an ingredient of an individual's personal liberty and any restriction on that right must be justified by a legitimate

state interest. The Court further held that there is a substantial constitutional question raised by the regulation of the plaintiff's hair length. Since the Court felt that there had not been a significant justification presented in the affidavit and supporting papers submitted in the District Court as to a legitimate state interest, the Second Circuit Court remanded the case for trial of the issues of fact, stating that the burden of proof was on the Commissioner at trial.

A plenary hearing was held before the Hon. Jacob Mishler on April 3, 1974 and as a result of that hearing, by memorandum of decision and order dated May 30, 1974, the Hon. Jacob Mishler granted judgment in favor of the plaintiffs declaring the hair regulation of the Suffolk County Police Department unconstitutional in that it violated the due process clause of the Fourteenth Amendment because the defendant Commissioner had failed to establish a legitimate state interest requiring hair length restrictions on members of the police department. A judgment was entered on June 19, 1974 permanently enjoining the Suffolk County Police Commissioner from enforcing the hair regulation and declaring the Rules of the Suffolk County Police Department with respect to same unconstitutional. On June 18, 1974 a notice of appeal was filed by the defendant Police Commissioner from said judgment to the United States Court of Appeals for the Second Circuit.

By order dated January 9, 1975, based upon the transcript of the record from the United States District Court for the Eastern District of New York, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court without opinion.

Reasons for Granting the Writ

1. The decisions of the Second Circuit Court of Appeals are directly in conflict with the decision of the United States Court of Appeals for the Eighth Circuit in the case of *Stradley* v. *Anderson,* 478 Fed. Rep. 2d 188, which affirmed the decision of the Federal District Court in the same case at 349 F. Supp. 1120. In the *Stradley* case, a virtually identical hair grooming regulation had been promulgated by the City of Omaha Police Department. The District Court had stated in its decision upholding the regulation that:

> "The public should not have to guess who is and who is not a bona fide officer of the law. Uniformity of dress prevents such problems. Grooming standards, as part of uniform regulations, are a legitimate state interest. The desire of the police officer for individuality in the selection of his hair style and length is outweighed by the legitimate state interest in immediate public recognition of bona fide police officers." Appendix C, p. 34a.

On appeal to the United States Court of Appeals for the Eighth Circuit, Circuit Judge Lay stated that:

> "One may argue that how one wears his hair has little to do with whether an officer might effectively apprehend criminals or otherwise fulfill his assigned mission as a policeman. This misses the mark. The critical factor is that police officialdom deems it necessary that the officer be well disciplined and that as part of that internal discipline he be required to maintain a neat appearance. The degree of that appearance, as long as it is not arbitrary or ureasonable, should not be the Court's concern." Appendix C, p. 28a.

One of the petitioner's main arguments before the District Court for the Eastern District and before the Circuit

Court of Appeals for the Second Circuit was that uniform standards of grooming including the regulation of hair length was a legitimate state interest. Further, the District Court and the Circuit Court of Appeals were not unmindful of the decision in the Eighth Circuit, as the Circuit Court of Appeals cites *Stradley* v. *Anderson, supra,* in its decision remanding the case to the Federal District Court for the Eastern District. Appendix B, p. 12a.

The police officer has a unique occupation in that the mere presence of the uniformed police officer is a visible sign of law enforcement. The uniformity in dress and grooming is not uniformity for its own sake but for the safety of the public at large. The decision of the court below is believed to be erroneous and the conflicting decision of *Stradley* v. *Anderson, supra,* is believed to be correct.

2. The other argument advanced by the Police Commissioner in the courts below is that safety of the police officer is a legitimate state interest. Chief Justice Mishler heard testimony in the District Court to the effect that certain lengths of hair present a safety problem. Indeed, ". . . pony tails present a hazard to law enforcement officers and are a proper subject for regulation" (Appendix B, p. 7a). Since there was indisputable proof that at least a portion of the regulation dealt with safety *and* the Court found factually that it was a valid subject for regulation, the petitioner Police Commissioner had sustained the burden of proof imposed by the Circuit Court of Appeals, i.e., that there existed a genuine public need for the regulation. There was further uncontroverted testimony that hair length would interfere with a police officer operating a police vehicle during a pursuit chase. A police officer's safety is certainly within the ambit of "public need", and any regulation which relates to his safety served a legitimate state interest.

The Circuit Court of Appeals for the Second Circuit has recently held that with respect to fireman a similar hair regulation as to the one involved in the instant case was constitutionally permissible. In the case of *Kamerling, et al.* v. *O'Hagan,* U. S. Court of Appeals for the Second Circuit, Decided March 18, 1975, Docket No. 74-2155, the Court held that the health and safety of firemen was a legitimate state interest and therefore the Fire Commissioner had a right to promulgate rules regarding the length of the hair of the members of the Fire Department.

In summary, a twofold justification for the regulation of the length of hair of members of the Suffolk County Police Department was presented to the Circuit Court of Appeals. One was safety of the police officer and the other was that uniform standards of grooming are necessary for the general morale of the Police Department. The *Stradley* decision, *infra,* is in direct conflict with the Second Circuit's opinion and is the correct decision. Further, by not recognizing the fact that safety of a police officer is just as important, if not more so than fireman, the Circuit Court has clearly erred.

3. The decision of the court below is also believed to be erroneous in that it conflicts with decisions which have been rendered by the New York State Courts including the highest court of the State of New York concerning identical grooming regulations. The case of *Greenwald* v. *Frank,* 70 Misc. 2d 632, 334 N.Y.S. 2d 680, judgment affirmed as modified, 40 App. Div. 2d 717, 337 N.Y.S. 2d 225, affirmed 32 N.Y. 2d 862, 346 N.Y.S. 2d 529 (1973), involved a virtually identical hair grooming regulation promulgated by the Nassau County Police Department. An Article 78 proceeding was commenced in the Supreme Court of the State of New York, County of Nassau, to nullify the hair regulation of the Nassau County Police Department. In dismissing the proceeding Special Term held that a policeman does

not have the same constitutional right as, e.g., a teacher or a lawyer, to determine his own personal appearance while in uniform. "The private interest . . . of a policeman in uniform to determine his own personal appearance is clearly offset by the 'powerful countervailing interest' of the police department and the general public." (*Greenwald* v. *Frank, supra,* p. 668).

In affirming Special Term, the Appellate Division, Second Department stated that the regulation was modest in nature and was proper in that there should be neatness and discipline in a large quasi-military organization as a police department so that the general public would have respect for individual police officers. The Court of Appeals thereafter unanimously affirmed the decision of the Appellate Division.

We now have the peculiar situation that because of the decision rendered by the Circuit Court of Appeals for the Second Circuit in the instant case that the Suffolk County Police Department may not regulate the length of hair of its members because of a violation of their constitutional rights, while in the sister County of Nassau, the State's highest Court allows the police commissioner to regulate the length of hair of members of the Nassau County Police Department.

In light of the existence of the *Greenwald* v. *Frank* case, *supra,* the Federal District Court should have refrained from interfering with a matter which clearly was in the process of being resolved in the State courts. *Younger* v. *Harris,* 401 U. S. 37 (1971) has stood for the proposition that the Federal courts should refrain from intervention in State court criminal prosecutions. Recently the doctrine has been extended to include a Federal District Court from interfering in a State civil proceeding where a State statute had been declared unconstitutional by a Federal District Court (*Huffman* v. *Pursue, Ltd.,* —— U.S.

——, decided March 18, 1975, No. 73-296). The principles of comity eunciated in the *Younger* case, *supra,* and the extension of same by *Huffman, supra,* shonid have been reason enough for the District Court and the Circuit Court to refrain from interfering in an area which was obviously being resolved in State proceedings.

4. Lastly, the Circuit Court of Appeals, affirmance of the District Court was based upon an erroneous assumption on the part of the Circuit Court, to wit, that a police department is not a quasi-military organization. When the case was first argued before the Circuit court, the position of the individual plaintiff, Thomas Dwen, had been that the policeman's right to wear his hair the way he chooses was analogous to the *school* cases (see *Griffin* v, *Tatum,* 425 F. 2d 210 (5th Cir.); *Breen* v. *Kahl,* 419 F. 2d 1034 (7th Cir.); *Durham* v. *Pulsifer,* 312 F. Supp. 411; *Broxton* v. *Board of Public Instruction of Divol Co., Fla.,* 303 F. Supp. 958). The Suffolk County Police Department argued, however, the analogy was certainly closer to the military cases if one were looking for some precedent in the area of hair cases (see *Doyle* v. *Koelbe,* 434 F. 2d 1014 (5th Cir. 1970); *Gianatasio* v. *Whyte,* 426 F. 2d 908 (2d Cir.)).

The Second Circuit in the instant case clearly indicates that a police department is *not* quasi-military in nature. Yet, the same Patrolmen's Benevolent Association which is the respondent in this petition has admitted in other court proceedings in the State courts that the Suffolk County Police Department *is* quasi-military in character. By making a determination that the Suffolk County Police Department was not quasi-military in character, the Second Circuit was making an erroneous assumption which eventually guided the District Court into making an erroneous determination as to rules and regulations concerning hair lengths of police officers.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: April 4, 1975.

Respectfully submitted,

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APPENDIX A

Statutes.

U.S.C.A. Const. Amend. XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Judgment of United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of January one thousand nine hundred and seventy-five.

Present: HON. J. JOSEPH SMITH
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
Circuit Judges,

74—1900

THOMAS DWEN, as President of the Suffolk County Patrolmen's Benevolent Association and THOMAS DWEN, individually,

Plaintiff-Appellee,

v.

JOHN L. BARRY, Commissioner of the Suffolk County Police Department,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

Appendix B.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

by: Vincent A. Carlin
Chief Deputy Clerk

Judgment of United States District Court.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Index No. 71-C-1020

Permanent Injunction

THOMAS DWEN, as President of the Suffolk County Patrolmen's Benevolent Association and THOMAS DWEN, individually,

Plaintiff,

against

JOHN L. BARRY, Commissioner of the Suffolk County Police Department,

Defendant.

This action having come on to be heard before the Court, the Honorable Jacob B. Mishler, District Judge, presiding,

Appendix B.

and the issues having been duly heard on the 3rd day of April, 1974, and the Honorable Jacob B. Mishler having rendered his decision in writing on the 30th day of May, 1974, setting forth Findings of Fact and Conclusions of Law, it is, therefore,

ORDERED, ADJUDGED AND DECREED, that Section 2/2.16 of the Rules and Procedures of the Suffolk County Police Department is unconstitutional and void, and it is further,

ORDERED, ADJUDGED AND DECREED, that the Suffolk County Police Commissioner, his agents, servants, employees and all persons acting in active concert with him are hereby permanently enjoined from enforcing Section 2/2.16 of the Rules and Procedures of the Suffolk County Police Department.

Dated and entered at Brooklyn, New York, this 11th day of June, 1974.

s/ JACOB MISHLER
U.S.D.J.

Appendix B.

Memorandum of Decision and Order of Justice Mishler.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

71 C 1020

May 30, 1974

THOMAS DWEN, as President of the Suffolk County Patrolmen's Benevolent Association and THOMAS DWEN, individually,

Plaintiff,

against

JOHN L. BARRY, Commissioner of the Suffolk County Police Department,

Defendant.

In November, 1971, this court denied a preliminary injunction and dismissed a civil rights action brought by the plaintiff. The United States Court of Appeals for the Second Circuit, by order dated August 22, 1973, reversed this court's dismissal of the complaint and remanded the case for trial on the issue of whether the state had ". . . some legitimate state interest reasonably requiring the restriction on the individual." 483 F. 2d 1126, 1130 (2d Cir. 1973). The appellate court held that the defendant had ". . . the burden of establishing a genuine public need for the regulation." 483 F. 2d at 1131.

The regulations concerning grooming standards (originally numbered 2/75.0 to 2/75.5 of the rules and regulations

of the Police Department, County of Suffolk, New York, dated July 19, 1971, effective August 1, 1971) have been modified and renumbered.[1] The complaint was amended to challenge the grooming standards set forth in Rule 2/2.16 as modified and in effect since November 15, 1973.

Defendant suggested that the grooming regulations serve the dual purpose of safety and morale. Defendant's sole witness was Deputy Commissioner Robert C. Rapp. Commissioner Rapp has been the Deputy Police Commissioner since July 21, 1973 and prior to that served as both a patrolman and a sergeant on the New York City police force and as an assistant district attorney of Suffolk County.

Commissioner Rapp testified that long hair presents a safety problem to an officer attempting to make an arrest by placing that officer in a position of being thrown of balance by an offender. The Commissioner demonstrated that

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[1] The regulations concerning hair, sideburns and mustaches are now numbered 2/2.16 subdivisions A, B and C. The regulations concerning beards, goatees and wigs are now subdivisions D and E of 2/2.16. As modified the grooming standards effective November 15, 1973 read as follows:

2/2.16 Members of the Force will be neat and clean at all times while on duty. Male personnel will comply with the following grooming standards unless excluded by the Police Commissioner due to special assignments:

A. Hair will be neat, clean, trimmed and present a groomed appearance. Hair will not go below the ears or the collar except the closely cut hair on the back of the neck. Pony tails are prohibited. In no case will the bulk or length of the hair interfere with the proper wear of any authorized headgear.

B. If a member chooses to wear sideburns,they will be neatly trimmed. Sideburns will not extend below the lowest part of the ear. Sideburns shall not be flared beyond 2" in width and will end with a clean-shaven horizontal line. Sideburns shall not connect with the mustache.

C. A neatly trimmed mustache may be worn.

a downward force applied to the head through the grasp of "superfluous" hair and transmitted to the forearm in contact with the police officer's back could result in an embarrassing and potentially dangerous upending. The demonstration, favored by a bountiful head of hair supplied by the official court reporter on duty, served to illustrate that pony tails present a hazard to law enforcement officers and are a proper subject for regulation. The remainder of 2/2.16A, however, bears no relationship to safety but rather related to hair styling.[2] The potential danger in hairdress is the ability of the offender to grip the hair and hold the fate of the police officer in his hand. Bulk and length of the hair is not regulated except as it interferes with "the proper wear of any authorized headgear." Thus the regulation would permit bulky and lengthy hair on the top of the head, thereby presenting the very problem that was demonstrated. In the remaining subdivisions, sideburns, mustaches and wigs are regulated and beards are barred. No proof was offered to support any claim of the need for the protection of the police officer in the pertinent regulations.

The high morale of police personnel is a matter of grave concern to the department. Proper grooming is an ingredient of the esprit de corps of a good law enforcement organization. The self-esteem generated in the individual and the respect commanded from the public it serves promotes the efficiency of the organization's work. However, with the exception of the general requirement that hair, sideburns and mustaches be neatly trimmed, the regulations do not provide standards for proper grooming. Rather, the standards do nothing more than demand uniformity. Uni-

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[2] The purpose of Section 2/2.16A is stated in the first sentence:

"Hair will be neat, clean, trimmed, and present a groomed appearance." The remainder of the subdivision relates to specific standards of good grooming.

Appendix B.

formity for uniformity's sake does not establish a public need.[3] Defendant offered no proof that beards, goatees, hair styles that extend below the ears or collar, or sideburns that extend below the lowest part of the ear or beyond 2″ in width and do not end with a clean-shaven horizontal line affect the morale of the members of the police department or earn the disrespect of the public.

Defendant failed to establish a legitimate state interest requiring these restrictions on the members of the police department. Rule 2/2.16 including its subdivisions is an arbitrary limitation and a purposeless restraint. As such, it is violative of the Due Process Clause of the Fourteenth Amendment and therefore unconstitutional.[4]

Judgment is granted in favor of the plaintiff and against the defendant declaring Section 2/2.16 of the rules and procedures of the Suffolk County Police Department unconstitutional, void and of no effect and permanently enjoining the defendant from enforcing Section 2/2.16.

Settle judgment in accordance with this memorandum of opinion on two days service (five days by regular mail).

s/ JACOB MISHLER
U. S. D. J

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[3] Commissioner Rapp testified that uniformity was required for identification. It would appear, however, that the uniform (issued by the department) supplies the necessary identification for police work.

[4] Section 2/2.16 fixes grooming standards for male members only. The court does not reach the equal protection claim of the Fourteenth Amendment.

Appendix B.

Decision of United States Court of Appeals, dated August 22, 1973.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 862—September Term, 1972.

(Argued June 14, 1973 Decided August 22, 1973.)

DOCKET No. 72—1037

THOMAS DWEN, as President of the Suffolk County Patrolmen's Benevolent Association and THOMAS DWEN, individually,

Plaintiff-Appellant,

v.

JOHN L. BARRY, Commissioner of the Suffolk County Police Department,

Defendant-Respondent.

Before: KAUFMAN, Chief Judge
SMITH, Circuit Judge, and
BRYAN,* District Judge.

Appeal from denial of preliminary injunction and summary dismissal of action by patrolman seeking to invalidate hair grooming standards adopted by Suffolk County Police Department, in the United States District Court

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* Of the United States District Court for the Southern District of New York, sitting by designation.

for the Eastern District of New York, Jacob Mishler, Chief Judge.

Reversed and remanded.

LEONARD WEXLER, Smithtown, N. Y. (Richard T. Haefeli, Smithtown, N. Y., of counsel), for Appellant.

PATRICK A. SWEENEY, Riverhead, N. Y. (George W. Percy, Suffolk County Attorney, Riverhead, N. Y., of counsel), for Appellee.

SMITH, Circuit Judge:

This is an appeal from denial of preliminary injunction and summary dismissal by the United States District Court for the Eastern District of New York, Jacob Mishler, Chief Judge, of a civil rights action brought by Dwen, individually and as president of the Suffolk County Patrolmen's Benevolent Association, seeking to invalidate hair grooming regulations of the Suffolk County Police Department[1] as in violation of the patrolmen's rights under

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[1] Order Number 71-1 Amending Rules and Procedures
POLICE DEPARTMENT, COUNTY OF SUFFOLK, N. Y.

X GENERAL
SPECIAL
PERSONNEL ORDER NUMBER 71-1 Date 19 July 1971
AUTHORITY Police Commissioner
SIGNATURE OF AUTHORITY JOHN L. BARRY

Effective 0001 hrs. 1 August, 1971 Chapter 2 of the Rules & Procedures is amended by the addition of the following section:

2/75.0 Members of the Force and Department shall be neat and clean at all times while on duty. Male personnel shall comply with the following grooming standards unless excluded by the Police Commissioner due to special assignment:

(*footnote continued on following page*)

the First and Fourteenth Amendments. We conclude that summary dismissal based on the pleadings and an affidavit submitted by Deputy Commissioner Eugene Kelley was improper. Accordingly, we reverse and remand for trial.

The court correctly recognized that the regulation might well raise constitutional issues of the right to free expres-

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(*footnote continued from preceding page*)

2/75.1 HAIR: Hair shall be neat, clean, trimmed, and present a groomed appearance. Hair will not touch the ears or the collar except the closely cut hair on the back of the neck. Hair in front will be groomed so that it does not fall below the band of properly worn headgear. In no case will the bulk or length of the hair interfere with the proper wear of any authorized headgear. The acceptability of a member's hair style will be based upon the criteria in this paragraph and not upon the style in which he chooses to wear his hair.

2/75.2 SIDEBURNS: If an individual chooses to wear sideburns, they will be neatly trimmed and tapered in the same manner as his haircut. Sideburns will not extend below the lowest part of the exterior ear opening, will be of even width (not flared), and will end with a clean-shaven horizontal line.

2/75.3 MUSTACHES: A short and neatly trimmed mustache may be worn, but shall not extend over the top of the upper lip or beyond the corners of the mouth.

2/75.4 BEARDS & GOATEES: The face will be clean-shaven other than the wear of the acceptable mustache or sideburns. Beards and goatees are prohibited, except that a Police Surgeon may grant a waiver for the wearing of a beard for medical reasons with the approval of the Police Commissioner. When a Surgeon prescribes that a member not shave, the beard will be kept trimmed symmetrically and all beard hairs will be kept trimmed so that they do not protrude more than one-half inch from the skin surface of the face.

2/75.5 WIGS: Wigs or hair pieces will not be worn on duty in uniform except for cosmetic reasons to cover natural baldness or physical disfiguration. If under these conditions, a wig or hair piece is worn, it will conform to department standards.

Appendix B.

sion, due process and equal protection if applied to other than uniformed personnel, but analogized the uniformed force to the military and sustained the regulations. A number of courts have upheld such regulations on similar grounds, terming police organization as para-military or quasi-military requiring strict discipline and uniformity of appearance, see, e.g., Greenwald v. Frank, 40 App. Div. 2d 717, 337 N.Y.S. 2d 225 (1972), aff'd without opinion, —— N.Y. —— (May 30, 1973). See also Stradley v. Anderson, 349 F. Supp. 1120 (D. Neb. 1972), aff'd —— F. 2d —— (8th Cir., May 17, 1973); Doyle v. Kammeraad, 310 Mich. 233, 17 N.W. 2d 165 (1943); Fraternal Order of Police v. Harris, 306 Mich. 68, 10 N.W. 2d 310 (1943); People ex rel. Masterson v. French, 110 N.Y. 494, 499 (1888).

Central to each of the "para-military" cases is the singular position afforded the military, Orloff v. Willoughby, 345 U.S. 83 (1953); see Hagopian v. Knowlton, 470 F. 2d 201, 204 (2d Cir. 1972), and the concept that those in the armed forces are deemed to surrender many important rights. "(T)he armed services, their officers, and their manner of discipline do serve an essential function in safeguarding the country. The need for discipline, with the attendant impairment of certain rights, is an important factor in fully discharging that duty." Raderman v. Kaine, 411 F. 2d 1104 (2d Cir.), cert. dismissed, 396 U.S. 976 (1969).

Extension to the uniformed civilian services or the police and fire departments of the unique judicial deference accorded to the military, however, seems to us not warranted. While these services have been characterized as para-military organizations,[2] see Doyle v. Kammeraad, supra;

[2] "The government of a police force assimilates to that required in the control of a military body. . . ." People ex rel. Masterson v. French, supra, 110 N.Y. 494, 500 (1888).

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Fraternal Order of Police v. Harris, supra; Greenwald v. Frank, supra; People ex rel. Masterson v. French, supra, the characterization is hardly justified either historically or functionally.

The civilian police force is a relatively recent development. It arose out of the need to supplement the private citizen's role in keeping the peace.[3] Any "para-militarism" of the force stems not from its origin nor from the nature of its duty but from the adoption of an organization with a centralized administration and a disciplined rank and file for efficient conduct of its affairs.[4] The use of such or-

[3] "The Anglo-Saxon police tradition . . . springs from a configuration of attitudes which were profoundly suspicious of central authority and hostile to the idea of guarding the local peace with militia." Tafe & England, Criminology, 317, 318 (4th ed. 1964); see also Hall, Legal and Social Aspects of Arrest Without Warrant, 49 Harv. L. Rev. 566, 579 (1936); Hall, Police and Law in a Democratic Society, 28 Ind. L. Rev. 133, 135-37 (1953).

[4] Clearly distinct from the continental tradition of a police system which was part of the military establishment under the control of the central state, the Anglo-Saxon police system in England, followed in the United States, developed from a system of local property owners responsible for keeping the peace in their own towns or villages. Statute of Winchester, 13 Edw. 1, § 2 (1285). See 49 Harv. L. Rev. 580-83; 28 Ind. L. Rev. at 135. Creation of a separate police force in London in 1829 was accomplished only after fear of an armed militia to be used against the liberty of citizens was overcome. See 49 Harv. L. Rev., supra, n. 3 at 587-90. W. Lee, A History of Police in England at 248. New York, the first to follow the English example, replaced its separately organized systems of night and day watchmen which were comprised generally of otherwise employed men, with a force of 800 men under a police chief. The force was un-uniformed, undisciplined and essentially political. Members were appointed for one year by local aldermen. The history of the force throughout the nineteenth century makes clear that there was no intention to create a civilian military. See R. Fosdick, American Police Systems at 109-10 (1920). The discipline as it exists today was a late development in the force.

ganization evolved as a practical administrative solution and out of any desire to create a military force.[5] See R. Fosdick, American Police System ch. 2 (1920); W. Lee, A History of Police in England (1901) (1971 ed.). The police force remains significantly different in character from the military. It is still locally controlled and organized, see N.Y. Unconsol. Laws § 5721, and subject to more direct control of the electorate, N.Y. Unconsol. Laws § 5722, Suffolk County Constitution art. XII § 1202 (a), (b) (4), (b) (5) and § 1211. Appointment of members of the force is made under Civil Service Regulation. While police officials are given broad discretion in running a department, dismissal of patrolmen is subject to court review. N.Y. Village Law § 8-806 (McKinney N.Y. Unconsol. Laws § 5732); see People ex rel. Hart v. Board of Fire Commissioners, 82 N.Y. 358, 360-61 (1880).

Discipline although essential to an effective police force as it is to the military is clearly of a different type.[6] Instant unquestioning obedience has been found essential to a soldier in action and his training and its attendant discipline is designed to develop such obedience. The same type of instant unquestioning obedience is not necessary for an effective police force. See Greenwald v. Frank, supra at 94. Rather it has been suggested that the military model of organization and discipline must not be followed too closely as a policeman unlike a soldier frequently acts individually on his own initiative and not subject to the immediate supervision of his superiors. See W. Lee, A History of Police in England at 401-402.

[5] Police are given the powers of a constable. N.Y. Village Law § 8-802 (McKinney) used under reference from N.Y. Unconsol. Laws § 5732; Suffolk Constitution art. XII § 1208. See N. Y. Town Law § 39.

[6] At issue in Masterson, see n. 2, and similar New York cases was the propriety of the dismissal of the patrolmen from the force for such malfeasance as negligent homicide or appearing on duty while intoxicated. There is little similarity between the disciplinary questions in these cases and Order No. 71-1 which the district court apparently found designed to inculcate discipline.

This is not to say, however, that the special nature of the police officer's duties and the recognized need to maintain a singular degree of discipline are immaterial. These factors are relevant to the determination of the validity of the General Order bearing not on the nature of plaintiff's rights, but on the existence of a legitimate state interest to be reasonably advanced by the regulation.[7] A policeman does not, however, waive his right to be free from arbitrary and unjustifiable infringement of his personal liberty when he elects to join the force.[8] See Garrity v. New Jersey, 385 U.S. 493, 499-500 (1967); Muller v. Conlisk, 429 F. 2d 901, 904 (7th Cir. 1970).

[7] See, e.g., Linquist v. City of Coral Gables, 323 F. Supp 1161 (S.D. Fla. 1971).

[8] However, with the exception of Hunt v. Board of Fire Commissioners of Massapequa Fire District, 68 Misc. 2d 261, 327 N.Y.S. 2d 36 (1971), the New York courts have sustained the validity of grooming regulations for firemen and policemen. See Olsewski v. Council of Hempstead Fire Department, 70 Misc. 603, 334 N.Y.S. 2d 504, 506 (Sup. Ct. 1972) (based on a showing of safety needs); Austin v. Howard, 39 App. Div. 2d 76, 332 N.Y.S. 2d 434 (1972) (upheld suspension of fireman for failure to wear proper boots). The Court of Appeals affirmed without opinion an order upholding the regulations at issue here, in a case brought by a Nassau County policeman. Greenwald v. Frank, —— N.Y. —— (May 30, 1973). The New York Supreme Court had recognized that a policeman has a constitutional interest in determining his own appearance but found that interest outweighed by the "powerful countervailing interest" of the police department and the general public." 70 Misc. 2d 632, 639, 334 N.Y.S. 2d 680, 688 (Sup. Ct. 1972). The Appellate Division while affirming the order held that the appeal failed to raise substantial constitutional issues. Its affirmance was based on a finding that "there should be neatness and discipline in a large quasi-military organization such as the Nassau County Police Department . . ." 40 App. Div. 2d 717, 337 N.Y.S. 2d at 225.

Appendix B.

While it has been argued that hair length controversies are much ado about nothing, we think there is a substantial constitutional issue raised by regulation of the plaintiff's hair length. The question is whether the government may interfere with the physical integrity of the individual and require compliance with its standard of personal appearance without demonstrating some legitimate state interest reasonably requiring such restriction on the individual. The first, third, fourth, seventh and eighth circuits have held that the Constitution limits the state's right to regulate the personal appearance of its citizens.[9] We agree. See Olff v. East Side Union High School District, 404 U.S. 1042 (Douglas, J., dissenting from denial of certiorari).

An increasing number of courts have recognized the right of the individual to style his own appearance, but there has been little consensus on the source of constitutional protection. The right has been found in the First

[9] Several district courts in this circuit have so ruled. In Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971), the court held that a prisoner's choice of hair length and facial hair is a personal liberty protected by due process and that without evidence supporting the prison's rationale for prohibiting beards and goatees a prisoner could not be forced to shave. A school's regulation of hair style was held to be violative of a substantial right of the student where no compelling state interest was shown for the regulation. See Durham v. Pulcifer, 312 F. Supp. 411 (D. Vt. 1970); but see Crossen v. Fatsi, 309 F. Supp. 114, 118 (D. Conn. 1970). A military prohibition on the wearing of short-haired wigs, admittedly neat and conforming to Army appearance requirements and not interfering with the proper execution of a reservist's duty was held an abuse of discretion and an unjustifiable interference with the right of the reservist to wear long hair in off-duty hours. Harris v. Kaine, 352 F. Supp. 769 (S.D.N.Y. 1972). While these cases and many of those in the other circuits have not concerned uniformed police and fire departments, the basic issue remains the same—the right of the state to impose standards of hair styling. The different status of the individual raising the claim bears on the question of whether the right is outweighed by a legitimate state interest.

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Amendment, Arnold v. Carpenter, 459 F. 2d 939 (7th Cir. 1972); the Ninth Amendment, Bishop v. Colaw, 450 F. 2d 1069 (8th Cir. 1971); the Equal Protection Clause of the Fourteenth Amendment, *Massie* v. *Henry*, 455 F. 2d 779 (4th Cir. 1972), and the due process guarantees of the Fifth and Fourteenth Amendments, Stull v. School Board of the Western Beaver Junior-Senior High School, 459 F. 2d 339 (3rd Cir. 1972); Richards v. Thurston, 424 F. 2d 1281 (1st Cir. 1970); Massie v. Henry, supra.

We may well base the right on the guarantee under the Due Process Clause of personal liberty of "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . ." Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). Cf. Roe v. Wade, —— U.S. ——, 93 S. Ct. 705, 726 (1973); Rochin v. California, 342 U.S. 165 (1952). Personal liberty is not composed simply and only of freedoms held to be fundamental but includes the freedom to make and act on less significant personal decisions without arbitrary government interference. Limitation of such a right requires some showing of public need.

We hold only that choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation. Here the department has failed to make the slightest showing of the relationship between its regulation and the legitimate interest it sought to promote. The sole presentation by the department was the affidavit submitted by Deputy Commissioner Kelley. That affidavit commented only that the regulation was directed at both uniformed and non-uniformed officers, it was silent on the question of the necessity for the regulation in maintaining discipline. In the absence of the requisite justification by the depart-

ment, dismissal of the complaint under Rule 12 (b) (6) was in error. Nor would summary judgment on the affidavit submitted be justified since a genuine issue was presented for trial. We imply no views on the merits. We indicate simply that, at trial, the Commissioner has the burden of establishing a genuine public need for the regulation.

Reversed and remanded.

Memorandum of Decision and Order of Justice Mishler, U.S.D.J., dated November 30, 1971.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

For the reasons expressed in the memorandum of decision dated Noember 3, 1971 the complaint is dismissed.

The Clerk is directed to enter judgment in favor of the defendant and against the plaintiff dismissing the complaint, and it is

SO ORDERED.

JACOB MISHLER
U. S. D. J.

Memorandum of Decision and Order of Justice Mishler, U.S.D.J., dated November 8, 1971.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff, a patrolman employed by the Suffolk County Police Department and president of Suffolk County Patrolmen's Benevolent Assoication, seeks a preliminary injunction enjoining enforcement of general order number 71-1, which order amends Chapter 2 of the Rules and Procedures of the Suffolk County Police Department, which became effective August 1, 1971. The order sets grooming standards for members of the Suffolk County Police Department.[1] Under the order, beards and goatees are forbidden; sideburns may "not extend below the lowest part of the exterior ear opening"; and mustaches must be short and neatly trimmed. The affidavit in support of the application states that community standards are less restrictive and that compliance with the order will, in effect, set him apart from the community in violation of his constitutional rights. The claim sets forth First and Fourteenth Amendment violations in that order deprives plaintiff of his right of free expression, due process and equal protection of law.

Uniformity of dress is part of the discipline of the local police department. It is the visible sign of the presence of the law. How the police officer appears to the public is one factor in effective law enforcement. Regulations involving dress and grooming are better left to the officials who are

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[1] Order set out in appendix.

aware of the local customs and taboos. It would be inappropriate for the court to frame such regulations, absent a clear showing of a violation of a constitutional right.

Circuit (now Chief) Judge Friendly in *Negron* v. *Wallace*, 436 F.2d 1139, 1141 (2d Cir. 1971), discussing a claim brought in the federal court under 42 U.S.C. § 1983, said, "Suits under that statute should not be lightly brought." He suggested that such claims be resolved ". . . by calm discussions with the state officials in the absence of any litigation whatsoever."

Turning to the merits of the application, authority for defendant's position is found in decisions reviewing army regulations concerning grooming. *Doyle* v. *Koelbe*, 434 F.2d 1014 (5th Cir. 1970). Plaintiff would distinguish those cases from the instant case on the ground that the New York Criminal Procedure Law includes in the definition of police officer certain members of the New York City Fire Department and investigators on the staff of county district attorneys.

The intent of the regulation is that it apply to uniformed police officers. This is evident from the list of exemptions submitted to the court by defendant as of August 18, 1971.[2]

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[2] Those exempted to August 18, 1971:

4 Detectives—Intelligence Squad, Undercover assignment, must frequently associate with persons and in circles where extreme hair styling is prevalent.

48 Detectives—Narcotics Squad.
Undercover assignment as above.

4 Detectives—Special Investigations Squad.
(Gambling, Vice, etc.)
Undercover assignment as above.

1 Detective —Robbery Squad.
Special assignment to infiltrate members of gang.

Application of the regulation to members not in uniform might very well bring the regulation within the prohibitions of the Constitution. *See Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965).

Nor is the attempt by the plaintiff to distinguish police from the military for the purposes of the regulation persuasive. The courts have held that members of the armed forces do not have their full constitutional rights while serving in the service. *Raderman* v. *Kaine*, 411 F.2d 1102 (2d Cir. 1969). In *Raderman*, the court indicated that it did not intervene in the matter involving a directive revoking one permitting long hair because ". . . there is clearly no action by the military which goes far beyond any rational exercise of discretion."

The plaintiff further distinguishes the duties of the police from that of the military in pointing out that the police officer has duty and non-duty hours. The court, assuming this questioned state, would nevertheless find a closer fact pattern in the case of a member of the National Guard.

In *Gianatasio* v. *Whyte*, 426 F.2d 908 (2d Cir. 1970), the plaintiff enlisted in the National Guard. Plaintiff was the manager of a shoe bazaar in Westport, Connecticut and claimed that his long hair helped him in his job and that it was essential to his civilian work. Because of his refusal to cut his hair as required by Army regulations, he was ordered to report for active duty. The court dismissed the attack on the validity of the regulation with the observation that the military has wide discretion in regulating hair length. *Gianatasio* v. *Whyte*, *supra*, at p. 911.

Motion for a preliminary injunction is denied, and it is

Appendix B.

So Ordered.

The court believes the claim is insufficient as a matter of law. It is however reluctant to dismiss the complaint without affording plaintiff an opportunity to argue the point. The court sets the matter down for argument on November 19th, 1971 at 10:00 A.M. All briefs to be submitted by November 15th, 1971.

Jacob Mishler
U. S. D. J.

APPENDIX C

Conflicting Opinion.

Larry Stradley, Appellant,

v.

Richard R. Andersen, as Chief of the Division of Police, Department of Public Safety, City of Omaha, Nebraska, Appellee.

No. 72-1698.

United States Court of Appeals,
Eighth Circuit.

Submitted April 12, 1973.

Decided May 17, 1973.

Police officer brought civil rights action challenging a general order which was promulgated by police chief and which related to standards of appearance and hair style for police officers. The District Court, 334 F.Supp. 72, dismissed the complaint and the police officer appealed. The Court of Appeals, Eighth Circuit, 456 F.2d 1063, reversed and remanded. On remand, the United States District Court for the District of Nebraska, Robert V. Denney, J., 349 F. Supp. 1120, upheld the regulation and the police officer appealed. The Court of Appeals, Lay, Circuit Judge, held that the general order did not deny individual officer due process in view of competing and legitimate interest of public safety division in maintaining an efficient and disciplined police force and public confidence as weighed against individual officer's personal likes or dislikes.

Affirmed.

Appendix C.

Before LAY and STEPHENSON, Circuit Judges, and TALBOT SMITH,* Senior District Judge.

LAY, Circuit Judge.

The Omaha Department of Public Safety, Division of Police, acting by and through its Police Chief, Richard R. Andersen, has promulgated a general order relating to standards of appearance and hair style for police officers. The plaintiff, Larry Stradley, an officer in good standing, brought this action under Section 1983 of Title 42 of the United States Code, alleging that his constitutional rights were violated by enforcement of the order. He alleges that he wears his hair and clothing neatly and in a well-groomed fashion with a portion of his hair extending slightly below his ears. He asserts that this does not restrict or hamper him in any way in the performance of his duties. He brought the suit as a class action for himelf and other officers similarly situated. The district court, after trial on the merits, found that the regulation was reasonable and calculated to achieve legitimate state interests. Stradley v. Andersen, 349 F.Supp. 1120 (D.Neb.1972). We affirm.[1]

The regulation reads:

> "This order pertains to Chapter I, Section 19, of the Rules and Regulations of the Police Division, 'Unprofessional actions, or conduct, while on duty or in uniform.'
>
> "All personnel shall be alert, efficient, neat and business-like before the public.

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* The Honorable Talbot Smith, Senior United States District Judge, Eastern District of Michigan, sitting by designation.

[1] The district court's earlier opinion requiring exhaustion of state remedies before federal trial, 334 F.Supp. 72 (D.Neb. 1971), was reversed and remanded for a plenary trial, 456 F.2d 1063 (8 Cir. 1972).

Appendix C.

> "Hair appearance has become quite a problem as far as appearance before the public is concerned within the Omaha Police Division.
>
> "Numerous comments, complaints, and criticism have been directed toward the Police Division based on outlandish types of hair styles. In order to reasonably conform with the general public, the following regulations shall be applicable, and shall be effective as of 1 June 1971, for all members of the Omaha Police Division.
>
> "HAIR: Hair must be evenly tapered on sides and back. No hair will lap or curl over the ears or shirt collar. Hair style cannot interfere with the normal wearing of the uniform headgear. This means that the hat of the uniform, when properly worn, must be in the close proximity to both the ears and the eyebrows of the person wearing the hat in a standard appearing manner.
>
> "SIDEBURNS: Maximum length of sideburns will be to the bottom level of the ear lobe. No flair (mutton-chops). Sideburns must be evenly tapered, cut parallel to the ground and can be no wider than one inch.
>
> "MUSTACHE: Mustaches must be neatly trimmed and tapered. Mustaches shall not extend beyond the corner of the mouth looking at a person directly to his face. No handlebar or Fu Manchu types of mustaches will be allowed.
>
> "GOATEE OR BEARD: Beards and Goatees will not be allowed under any conditions. The face must be clean shaven for working purposes other than specified above.
>
> "Exceptions to these rules shall only be allowed for officers who are working in the undercover type of ac-

> tivity within and for the Omaha Police Division. The special exemptions for this purpose shall be by request and directive of the Deputy Chief in charge of the Criminal Investigations Bureau."

In essence, Chief Andersen testified that the purposes of the regulation were (1) the maintenance of an efficient and disciplined police force and (2) the maintenance of public confidence.

The order is not attacked as being unreasonable. The basis of plaintiff's argument is that "[p]olicemen, like firemen, probation officers, teachers, other classes of public employees, public school students, and other persons have a federal constitutional right to choose their personal hair style and length." The argument is made that the defendant has failed to sustain its burden that such an order is necessary to enable police officers to carry out the mission of a city police department.

The plaintiff further contends that this court's opinion in Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971), upholding the right of a school boy to wear whatever hair style he and his parents desired, is equally applicable to a police officer. We there found that the right involved, although not cognizable on a First Amendment ground, was based on the freedom to govern one's personal appearance and commanded protection under the Due Process Clause of the Fourteenth Amendment. However, we acknowledged that recognition of this right was not unconditional and required us to weigh the competing interests asserted. We found that the school authorities failed to demonstrate any necessity of the regulation of hair length and style.

Appealing contrasts are urged to justify individual styling—thus plaintiff pleads that the order will allow mustaches "such as that of Adolph Hitler, but not permit those

modeled after Mark Twain, Dean Acheson or other prominent and respected persons" We cite these comparisons because we think the essential weakness of the argument lies in this contrast—plaintiffs are not serving in the role of dictators, authors or statesmen, but rather, they have undertaken responsible roles in a disciplined organization as public officers to enforce and maintain law and order in a given community. Herein lies the distinction between weighing the competing interests of a school board and a school student.

Traditionally, the policeman has been a highly trained officer who is entrusted with a responsible and oftentimes dangerous role as a public servant. His work habits on active duty require disciplined conduct, regimentation and frequent strict adherence to regulation and authorized detail. His job is often a delicate and difficult task to lawfully act against those who are sometimes unwilling to recognize any rules or ethics. It is essential that a policeman's training be such that he be taught to obey strict disciplinary procedure and rules in order to lend practical assurance that he will follow command and not abuse his awesome authority. As part of this discipline the police department has determined that an officer shall be neat in his appearance. There can be little argument that this requirement constitutes a legitimate departmental interest.

[1, 2] We reject the idea that community standards provide a legitimate basis in weighing constitutional rights guaranteed to the individual. Whether public acceptance or rejection of a particular hair style exists in one community or another should not be a standard of concern to a federal court. What must be controlling to the court in evaluating competing interests is whether the policy of the state espouses a societal interest which outweighs the individual concern. Thus, what is essential here is that the

Public Safety Department stresses the need for public respect of its officers and that it feels such respect flows in part from the officers' individual appearance. If Chief Andersen misjudges, as plaintiff suggests, what necessary measures should be taken to achieve community respect, this basically must be the department's concern, not ours.

[3] One may argue that how one wears his hair has little to do with whether an officer might effectively apprehend criminals or otherwise fulfill his assigned mission as a policeman. This misses the mark. The critical factor is that police officialdom deems it necessary that the officer be well disciplined and that as part of that internal discipline, he be required to maintain a neat appearance. The degree of that appearance, as long as it is not arbitrary or unreasonable, should not be the court's concern.

[4] Unlike the school cases, those officials who have spent their life in police work, who are trained in law enforcement discipline, possess far better empirical judgment of what is essential to achieve an efficient and disciplined police force than the officers themselves, the public or the predeliction of individual judges. If this results in a problem of low morale of police personnel, which plaintiff contends, this too is Chief Andersen's dilemma, not the courts'. This does not mean that the courts will ignore an arbitrary edict which might deprive a police officer of his sense of dignity or morality as a human being. But we are not dealing with arbitrariness—the only issue before us is the authority of a Public Safety Division of a municipality to set standards of neat appearance for its personnel balanced against the individual rights of a police officer to appear as he likes. In light of this competing and legitimate interest of the Public Safety Division, as weighed against the individual officer's personal likes or dislikes, we sustain the regulation. In accord Greenwald

v. Frank, 70 Misc.2d 632, 334 N.Y.S.2d 680 (Sup.Ct. 1972); Dwen v. Barry, 336 F.Supp. 487 (E.D.N.Y.1971);[2] cf. Doyle v. Koelbl, 434 F.2d 1014 (5 Cir. 1970), cert. denied, 402 U.S. 908, 91 S.Ct. 1380, 28 L.Ed.2d 649 (1971)

For the reasons herein stated, the judgment of the district court is affirmed.

LARRY STRADLEY, Plaintiff,

v.

Richard R. ANDERSEN, as Chief of the Division of Police, Department of Public Safety, City of Omaha, Nebraska, Defendant.

Civ. No. 71-L-228.

United States District Court,
D. Nebraska.

Oct. 27, 1972.

Suit under Civil Rights Act. After complaint was dismissed, 334 F.Supp. 72, the Court of Appeals, 456 F.2d 1063, determined that complaint was not subject to dismissal for reasons of comity inhering in abstention doctrine, and reversed and remanded for a trial on the merits. On remand, the District Court, Denney, J., held that order of municipal employer governing length and style of hair and mustaches for police officers was reasonably calculated to

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[2] Plaintiff urges that in the *Dwen* case the regulation applied only to uniformed officers. The present regulation encompasses all police department personnel with special exceptions allowed for those officers working in undercover activity. The district judge in *Dwen* expressed a concern that if applied to all members of the police force it might fall within constitutional prohibitions. By our holding and for the reasons we have generally discussed, we disagree.

achieve legitimate state interests of allowing immediate public recognition of bona fide police officers and of projecting a "neutral" appearance and was not unconstitutional as interfering with right of officers to choose their individual hair style or length, nor did order amount to impermissible sex discrimination by reason of fact that it did not apply to female officers.

Order accordingly.

MEMORANDUM OPINION

DENNEY, District Judge.

This case comes before the Court upon application of the plaintiff for a preliminary and permanent injunction restraining enforcement of order #48-71 promulgated by Chief Richard R. Andersen, of the City of Omaha Police Division. The action is prosecuted as a class action on behalf of the plaintiff and all others similarly situated. Pursuant to order of the 8th Circuit Court of Appeals, 456 F.2d 1063, this Court has conducted a hearing on the merits of plaintiff's application and now renders its opinion.

[1] The Court would take this opportunity to point out that, although it now appears to the Court that at least in this Circuit it is well settled that any person claiming deprivation of any possible civil right need not make an attempt to solve his problem with his immediate superior nor seek relief from his own local courts before he can command this Court to interfere via 42 U.S.C.A. § 1983, the foundation for this rule is legally questionable and has had disastrous effects on the dockets of the district courts.

The rule regarding no exhaustion has its roots in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 [1961]. In *Monroe*, the Supreme Court traced the legislative history of § 1983 and concluded that the intent of Congress was "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[1] Thus § 1983 was enacted with particularly the "lawless conditions existing in the South in 1871"[2] in mind. From this, the Court concluded that the "federal remedy [under § 1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[3] The Court suggests that a more responsive rule to the legislative history would be that exhaustion is not required where the state remedy, adequate in theory, is not available in practice. This would foster and give incentive to the States to continue to be as zealous in the protection of federal constitutional rights as the federal courts. It is time for the federal judiciary to recognize that Federal Courts are not the sole protectors of constitutional rights and that the dual nature of sovereignty in the United States obligates the federal court to respect their State counterparts. As this Court previously stated, quoting no less than Chief Justice Burger:

> "People speak glibly of putting all the problems of pollution, of crowded cities, of consumer class actions and others in the federal courts. We should look more to state courts familiar with local conditions and local problems." Alberda v. Noell, 322 F.Supp. 1379, 1382 [E.D.Mich.1971], Stradley v. Andersen, 334 F.Supp. 72 [D.Nev.1971].

The desirability of the rule as to the facts of this case is evident. Chief Andersen testified that the order was issued

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[1] Monroe v. Pape, 365 U.S. 167, 174, 81 S.Ct. 473, 477, 5 L.Ed.2d 492 [1961].

[2] Id.

[3] Id. p. 183, 81 S.Ct. p. 482.

on May 17, 1971, but that it was not to be effective until June 1, 1971. The Chief stated the interim period was designed to allow any interested officer an opportunity to come in and discuss the regulation if he felt it was not adequate or should be modified. It was Chief Andersen's testimony that he was open to suggestions during the interim period, but no one approached him directly. Instead, just before the regulation was to be effective, he was served with a temporary restraining order issued by this Court. Had the plaintiff attempted to discuss the matter with Chief Andersen, this litigation might well have been avoided. Chief Andersen was the first step in plaintiff's administrative remedies and whether or not plaintiff should have had to exhaust his administrative remedies is not at issue. At least, he should have had to attempt the first step.

The order in question regulates the length of hair permissible for certain male members of the Omaha Police Division.[4] (Appendix A)

The plaintiff does not contend that it is not proper for Chief Andersen to promulgate rules and regulations for the operation of the Police Division nor that grooming cannot be a proper subject of regulation. The plaintiff only attacks the validity of order #48-71.

The threshold inquiry of the Court is whether or not the police officers have any constitutionally protected rights relating to hair style or length that order #48-71 might infringe.

[2, 3] It has become the law in this Circuit, through the vehicle of cases involving schools and students, that each

[4] It was the testimony of Chief Andersen that, although the order as promulgated was sufficiently broad to encompass the entire Division, it was not intended to apply to any female officers or male undercover officers and had not been enforced against such individuals.

member of the general population possesses a right to choose his or her own style and length of hair and that such choice is protected by the Ninth Amendment of the United States Constitution. Bishop v. Colaw, 450 F.2d 1069 [8th Cir. 1971]. The Supreme Court has had occasion to hold that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 [1967]. It follows that at least in this Circuit police officers have a constitutional right to choose their individual hair style or length.

[4] The Court's inquiry is not, however, finished because personal freedoms are not absolute and must give way when outweighed by legitimate State interests. Bishop v. Colaw, *supra,* 450 F.2d at p. 1075.

[5] Here, the Court is convinced that the order served two legitimate state interests, either of which would be a proper basis for the order.

Chief Andersen testified that the order was in part based upon the need to have uniform standards of grooming throughout the force. This need is not unlike that which causes the division to require a certain style of shirt and hat or that all officers should wear black shoes. The testimony of plaintiff's witnesses did not dispute the need for standard uniforms for officers. Courts such as the United States District Court for the Eastern District of New York have held uniformity of dress, including regulation of grooming, is a legitimate State Interest. Dwen v. Barry, 336 F. Supp. 487 [E.D.N.Y. 1971]. Chief Andersen elaborated in his testimony as to the necessity of such uniformity, saying that it is important to the safety of the public that the public be able to recognize police officers immediately. It is apparent to the Court that any hesitation in seeking assistance or cooperating with officers because of

the unique position of policemen could mean the difference between life and death. The public should not have to guess who is and who is not a bona fide officer of the law. Uniformity of dress prevents such problems. Grooming standards, as part of uniform regulations, are a legitimate State interest. The desire of the police officer for individuality in the selection of his hair style and length is outweighed by the legitimate State interest in immediate public recognition of bona fide police officers.

It was Chief Andersen's expert opinion, based upon his 21 years of experience as a police officer, that there exists a direct relationship between the personal appearance of a police officer and his ability to effectuate his responsibilities. The Chief stated that, in his opinion, the policeman should project a "neutral" appearance, identifying with neither far-out section of the general public. This will enable the Police Division to obtain a maximum amount of respect from the community it is charged with protecting. The Court is equally convinced that such neutrality is a legitimate State interest. It is beyond argument that if the majority of the public was in open rebellion over the length of policemen's hair it would impair the effectiveness of the individual officer. Although such outrage is not present herein, the Chief did not testify that numerous complaints had been received. The Court is of the opinion that from such complaints the Chief could legitimately draw the inference that the effectiveness of some of his officers was not being maximized because portions of the public did not have the highest respect for the Police Division solely because of the personal appearance of some of its officers.

[6] It is the Court's opinion that projecting a "neutral" appearance, because of its relationship to the effectiveness of the police officer and the respect of the public, outweighs the police officer's desire to assert his individuality by

identifying with a particular segment of society through his hair length or style.

It remains to the Court to determine whether the regulation is reasonably related to the legitimate State interest sought to be attained. Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 [1970].

[7, 8] The testimony of the plaintiff's witnesses revealed that there was a lack of agreement among the dissident police officers as to how the regulation should be properly drawn. The plaintiff himself, in the hearing of June 2, 1971, testified that police officers should be allowed Fu Manchu mustaches, but not goatees. During the hearing of October 2, 1972, witness Archer for the plaintiff testified that he had left the force because of the regulation, but that he did not believe that policemen should be allowed to have shoulder length hair similar to what he now wore. It is evident that, no matter what regulation Chief Andersen was finally able to devise, not everyone could be pleased. Chief Andersen testified that the regulation was not lightly drawn. Over a period of some two months, he and his four deputy chiefs examined similar regulations from other communities. In the end, they considered the average standards of the community in which the officers had to perform their duties and carefully drafted the regulation with an eye to allowing for a certain range of individuality within the Division.[5] The Court has examined the regula-

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[5] It is appropriate that the regulation was based, in part, upon contemporary community standards as to what the public would accept in the personal appearance of their public servants. Community standards have often been used to gauge the limits of constitutional rights. *See*, e. g., Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 [1957]. What a community in California might accept in its public servants quite properly may not be the same as Nebraska's requires.

tion at some length and cannot say that on its face nor from the evidence adduced it fails to be calculated to reasonably achieve the legitimate State interests as denominated by the Court. The regulation provides for hair styles and lengths somewhere in the middle range of those that abound today.

[9] It is the conclusion of the Court that the defendant has sustained his burden of proving the necessity of order #48—71 of Chief Andersen and that plaintiff's application for injunctive relief should be denied. The regulation is reasonable and calculated to achieve legitimate State interests. An Order in accordance with this opinion will be entered contemporaneously herewith.[6]

APPENDIX A

DEPARTMENT OF PUBLIC SAFETY DIVISION OF POLICE
OMAHA NEBRASKA

Date: 17 May 1971
Monday

DIVISION GENERAL ORDER #48—71

RE: STANDARDS OF APPEARANCE FOR POLICE OFFICERS

This order pertains to Chapter I, Section 19, of the Rules and Regulations of the Police Division, "Unprofessional actions, or conduct, while on duty or in uniform."

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[6] Plaintiff has also argued that order #48-71 amounts to impermissible sex discrimination, since it does not apply to female officers. The Court is of the opinion that the reasons herein cited for sustaining the regulation as to the Ninth Amendment apply as well to this contention of plaintiff and that the classification is not arbitrary within the meaning of Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 [1971].

All personnel shall be alert, efficient, neat and business-like before the public.

Hair appearance has become quite a problem as far as appearance before the public is concerned within the Omaha Police Division.

Numerous comments, complaints, and criticism have been directed toward the Police Division based on outlandish types of hair styles. In order to reasonably conform with the general public, the following regulations shall be applicable, and shall be effective as of 1 June 1971, for all members of the Omaha Police Division.

HAIR: Hair must be evenly tapered on sides and back. No hair will lap or curl over the ears or shirt collar. Hair style cannot interfere with the normal wearing of the uniform headgear. This means that the hat of the uniform, when properly worn, must be in close proximity to both the ears and the eyebrows of the person wearing the hat in a standard appearing manner.

SIDEBURNS: Maximum length of sideburns will be to the bottom level of the ear lobe. No flair (mutton-chops). Sideburns must be evenly tapered, cut parallel to the ground, and can be no wider than one inch.

MUSTACHE: Mustaches must be neatly trimmed and tapered. Mustaches shall not extend beyond the corner of the mouth looking at a person directly to his face. No handlebar or Fu Manchu types of mustaches will be allowed.

GOATEE OR BEARD: Beards and Goatees will not be allowed under any conditions. The face must be clean shaven for working purposes other than as specified above.

Appendix C.

Exceptions to these rules shall only be allowed for officers who are working in the undercover type of activity within and for the Omaha Police Division. The special exemptions for this purpose shall be by request and directive of the Deputy Chief in charge of the Criminal Investigations Bureau.

By order of

/jp

[s] Richard R. Andersen
Richard E. Andersen
Chief of Police